

By the common law the plaintiff is entitled to recover the whole of the damages awarded in this case.

The plaintiff proved that the repairs to the said premises cost him the sum of \$2,650. He stated further that he had engaged an architect to prepare a plan for carrying out the repairs and that the architect had charged him \$516 of which he had paid \$100 and the balance was still due to the architect. When the architect in question, a Mr. Kwan, gave evidence he stated that he had not received any payment at all and that whole sum of \$516 was still due. It would appear that the plan was prepared by one Mr. Siddique and although it was signed by Mr. Kwan it was Mr. Siddique who was in charge of the repairs and the plaintiff's evidence was that he had paid \$100 to Mr. Siddique. Although these repairs were carried out some two years ago the remaining sum due to the architect has not yet been paid. In my opinion the whole cost of the plan to the plaintiff was only \$100. I would therefore award the plaintiff the cost of the repairs amounting to \$2,650 and another \$100 being the cost of the plan.

The plaintiff also claims interest on the amount awarded as damages from the date of the accident. In my opinion the plaintiff is entitled to interest from the date on which payment for the repairs was made. The repairs were completed and payment made to the contractor on the 12th July 1967. A demand for payment was then made to The Ocean Accident and Guarantee Corporation Ltd. the insurers of the second defendant's vehicle but this insurance company denied liability on the ground that the accident was caused entirely by the negligence of the first defendant. In my opinion the plaintiff is entitled to interest on the sum of \$2,750 at 6 per cent per annum as from the 12th July 1967. Accordingly there will be judgment for the plaintiff in the sum of \$2,750 together with interest thereon at 6 per cent per annum as from the 12th July 1967. The second defendant will also pay the plaintiff's costs of this action as taxed.

Judgment for the plaintiff.

Solicitors: *Murphy & Dunbar; Allen & Gledhill.*

**CHEONG KONG ENTERPRISE CO. SDN.
BHD. v. FOONG SEONG MINES LTD. & ORS.**

[F.C. (Ong Hock Thye C.J. (Malaya), Gill & Ali F.J.J.)
July 21, 1969]

[Ipoh—Federal Court Civil Appeal No. 18A of 1969]

Practice and Procedure — Specially indorsed writ — Application for writ and statement of claim to be struck out — Order that writ and statement of claim be struck out but matter adjourned into open court for further argument — Whether final judgment.

Land Law — Caveat — Application for extension of private caveat — Whether appellant has locus standi to be heard in relation to caveat — Land Code (Cap. 138), ss. 326 and 327.

In this case the proprietors of certain mining lands had leased the land to certain miners. Subsequently the proprietors purported to transfer the lands to a 3rd party. Thereupon the miners lodged a private caveat against the land. Subsequently they commenced an action against the proprietors and the 3rd party and by summons in chambers they applied to court for an extension of the caveat. This was granted and the caveat was extended and "remain in force until the final disposal of this suit." An application was made by the proprietors for the writ and statement of claim to be struck out and after hearing the parties the court ordered the writ and statement of claim to be struck out, but ordered that the matter be adjourned into open court for further argument. The miners were advised to apply for a further extension of the caveat. They did so and an order was made that the caveat remain in force "till the final disposal of a fresh suit to be filed." The 3rd parties appealed against this order.

Held, dismissing the appeal: (1) the suit in this case had not been finally disposed of and therefore the miners' application for further extension of the caveat was wholly misconceived and unnecessary;

(2) an application for the extension of a private caveat concerns only the caveator and the caveatee and the appellant therefore had no *locus standi* in the appeal;

(3) no order had been made for the renewal of the caveat and until such an order was made the caveat would remain on the register.

Case referred to:—

(1) *In re Riddell, ex parte Earl of Strathmore* (1888), 20 Q.B. 512, 516.

FEDERAL COURT.

Chin Swee Onn for the appellants.

F.C. Arulanandom for the 1st respondent.

P.P. Dharmananda for the 2nd respondents.

Ong Hock Thye C.J. (delivering the judgment of the court): We dismissed this appeal at the hearing and now state more fully the grounds of our decision.

Pursuant to an agreement made on May 20, 1964 between Foong Seong Mines Limited (hereinafter called the miners) and the trustees abovenamed* (who are the registered proprietors of certain mining leases in the Mukim of Ulu Kinta) the miners were given permits, renew-

* the second respondents.

able yearly, to mine certain lands comprised in Mining Leases Nos. 4441 and 4538 at a tribute of 10 per cent "for the term of the leases and any renewals thereof". In addition to the tribute, the consideration given by the miners consisted of substantial benefits to the proprietors by way of advances in cash.

In working the said lands the miners suffered losses amounting to over \$435,000 during the years 1965-67, but in 1968 things took a turn for the better and, for the first half year, they made a profit of \$2,426.40. Later in the same year the proprietors purported to transfer or sublease the said lands to a third party, Cheong Kong Enterprise Co. Ltd., whereupon the miners lodged a private caveat against the lands in question on September 6, 1968. On October 7, 1968 they received from the Collector of Land Revenue a notice of intended removal of the caveat at the end of one month from October 1, 1968 or such further period as the court might order.

On October 4 the miners commenced an action for specific performance and other reliefs against the proprietors and third party by specially indorsed writ and, by summons in chambers filed on October 9, they applied to the court for an order for extension of the caveat. The order was made *ex parte* on October 16 that the caveat be extended and "remain in force until the final disposal of this suit".

On November 7 the proprietors applied by summons in chambers for the writ and statement of claim to be struck out, on the ground that a specially indorsed writ could not be issued where the statement of claim alleged collusion. After hearing the parties the court took time for consideration and on January 20, 1969 ordered that the writ and statement of claim be struck out, but on the application of counsel for the plaintiffs ordered that the matter be adjourned, under Order 55 rule 22A, into open court for further argument.

Why this complication should have arisen over a trivial point of procedure is beyond our comprehension. Granted that the writ could not be specially indorsed, the simple act of striking out the special indorsement should have converted the writ into one ordinarily indorsed, to which no exception could be taken under Order 3 rule 6(1)(a). A special indorsement is simply a facility exercisable at the option of the plaintiffs. They could have amended under Order 28, rules 1 or 2, or resorted in any event to Order 70 rule 1, instead of which a mountain was made out of a technical molehill and confusion worse confounded.

The writ and statement of claim having been struck out, the miners, plaintiffs in the

A action, were advised to apply for a further extension of their caveat on the ground that the defendants had "already presented a memorandum of transfer of the said lands and if the caveat expires the said transfer will be registered". At the hearing of the summons in chambers application was made to amend the date of extension with effect from January 20, 1969 instead of date of order, that is to say, retrospectively to the date the writ was struck out. The defendants, proprietors of the land, objected on the ground that, as the writ had been struck out, there was no claim before the court and the application should properly have been by originating summons; moreover, the caveat having expired on January 20, 1969 it could not be revived by a subsequent order. Objections were raised on other grounds as well, which we consider irrelevant for present purposes and unnecessary to refer to. On February 6, 1969 an order was made that the caveat be extended and "remain in force for a period of one month from January 20, 1969 and thereafter till the final disposal of a fresh suit to be filed". The summons in chambers had not been served on the defendants; nevertheless they appeared, though, apparently, not under protest. This appeal is by the third party only, against the order of February 6, their co-defendants, the proprietors of the caveated lands, being served as co-respondents to this appeal.

We have grave doubts regarding the appellants' *locus standi* in this appeal. If, as the defendants claimed, the action was well and truly at an end (as we think it was) upon the order of January 20, 1969 being made, these appellants have no right, *dehors* that action, to be heard in relation purely to the caveat. An application for extension of a private caveat concerns only the caveator and the caveatee, who is "any person or body whose land or interest is bound by the caveat": *vide* section 326(1), Land Code. Nor was the order appealed against made pursuant to an application by this appellant as a "person aggrieved by the existence of a private caveat", under section 327. Unless the appellant is in law entitled to appeal against the order, this appeal must fail *in limine*.

We are further of opinion that the miners' application for further extension of the caveat was wholly misconceived and unnecessary. As Mr. Sharma quite rightly conceded at the hearing of the application, the order of January 20 "as it stands is in force" and the suit had not been finally disposed of. In general, a judgment or order which determines the principal matter in question is termed "final". As Lord Esher M.R. said in *In re Riddell, ex parte Earl of Strathmore*:⁽¹⁾

"In my opinion a 'final judgment' means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined, in favour either of the plaintiff or of the defendant. I think that definition will be found to cover most cases, though perhaps not every one. . . . In my opinion the question is, not only was the claim determined, but was it finally determined? It can only have been finally determined if between the two parties to the action it cannot be raised again".

Plainly the striking out of a writ on a procedural objection is not a final order in the action.

The essential cardinal fact, however, simply is this: the order of January 20, 1969 was silent as to the caveat. Without an express order of the court for its removal the Collector of Land Revenue has no authority to remove any private caveat: see section 327. Until there is such an order the caveat remains on the register. The order of February 6, 1969 was therefore wholly superfluous.

We accordingly dismissed this appeal and made no order as to costs.

Appeal dismissed.

Solicitors: *Chin Swee Onn; Arulanandom & Co., Dharmananda & Co.*

MERLIMAU PEGOH LIMITED v. COLLECTOR OF LAND REVENUE JASIN

[A.C.J. (Sharma J.) July 21, 1969]

[Malacca — Land Reference No. 1 of 1968]

Practice and Procedure — Trial — Addresses at — Party making submissions in writing — Objection by other party — Inequality in the lasting qualities of the submissions — Unfairness to one side — R.S.C. 1957, O. 36 r. 36.

Order 36 rule 36 contemplates oral arguments and submissions. Counsel could of course address the court by reading out from the notes or by reading out the whole of the prepared submissions and the court is bound to give a hearing. On the ultimate analysis it may make very little difference to the result of a case whether the submissions were oral or in writing. However the court has power to ask or call for written arguments or submissions when necessary.

Cases referred to:—

(1) *Amjad Ali v. Suresh Ranjan Pal & Ors.* A.I.R. (1921) Cal. 426.

(2) *Trimbak v. Krishna Rao & Ors.* A.I.R. 1929 Nagpur 89.

LAND REFERENCE.

L. Kandan for the appellants.

Abdullah bin Ngah (Legal Adviser Negri Sembilan/Malacca) for the respondent.

Sharma J.: This land reference is before me to-day for argument. The learned Legal

A Adviser appearing on behalf of the respondent made his oral submissions and at the close of his submissions, the learned counsel for the applicants began his submissions and after making a few observations said that he had already prepared his written submissions and intended to hand over a copy of those submissions to me "in order to save the time of the court" as he put it. The counsel for the respondent objected to this procedure and said that as he had made only oral submissions, the counsel for the applicants had no right to put or hand in written submissions and that it was unfair to the respondent especially when he as the respondent's counsel was not supplied with a copy of those submissions. He also stated that if he knew that the applicant's counsel was going to make written submissions he himself would have liked to do the same.

D Faced with that situation in the course of argument I have to determine and decide the objection which has been raised. I am informed by counsel that there is no authority on the point except that this practice is permitted by certain courts.

E Order 36 of our Rules of the Supreme Court deals with trial. Part VII of Order 36 is headed "Proceedings At Trial" and this is covered by rules 31 to 55D. I may mention that by an unnoticed omission there seems to be no Part VIII of Order 36 as Part IX starts immediately after rule 55D. That, however, is not very relevant. Order 36 rule 36 deals with F addresses at the trial and reads as follows:—

"Upon any trial the addresses shall be regulated as follows: the party who begins, or his counsel, may open his case before calling evidence and shall, whether or not his opponent adduces evidence, have the right of final reply, and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any."

G Order 36 rule 39 deals with entry of judgment at or after trial. This suggests that as far as entry of judgment is concerned it is a thing apart from the trial. In other words the use of the word "trial" in Order 36 means no more than the hearing of the suit or matter. *Jowitt* H in the Dictionary of English Law says:—

"Under the practice in Chancery before the Judicature Acts, 1873-75, the hearing of a cause was the argument of it in court after the conclusion of the pleadings and the close of the evidence. In the case of a suit heard on motion for decree, the original hearing on the motion for decree frequently did not dispose of the suit, but made it necessary to have a subsequent hearing on further consideration. Under the present practice the hearing of an action takes the form either of a trial or a motion for judgment."

Giving the meaning of trial, the same learned author goes on to say:—

"Trial, the hearing of a cause, civil or criminal, before a judge who has jurisdiction over it, according to the laws of the land. A trial is the finding out by